IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*, *Plaintiffs,* V. GREG ABBOTT, *et al.*, *Defendants.*	§ § § § § § § § § § §	Case No. 3:21-cv-00259 [Lead Case]
UNITED STATES OF AMERICA, *Plaintiff,* V. STATE OF TEXAS, *et al.*, *Defendants.*	§ § § § § § § § § § §	Case No. 3:21-cv-00299 [Consolidated Case]

OPPOSITION TO MOTION TO COMPEL

It is undisputed that Governor Greg Abbott and Attorney General Ken Paxton are not named parties to the United States' lawsuit. But the United States insists they are proper recipients of party discovery because it has also named *the State of Texas*. There is no logical reason why that is so, and the United States does not identify one in its motion to compel. Rather, according to Section 10305(d) of the Voting Rights Act, *the State of Texas* is limited to those state entities from which the United States could receive relief in connection with its vote-dilution claims. The United States fails to explain how the Governor and Attorney General fall within that definition. Moreover, the United States' motion is both premature and unnecessary.

Defendants remain willing to negotiate regarding document production on behalf of the Governor, given his status as a defendant in most of the private plaintiffs' lawsuits. The United States

inaccurately and inappropriately represents otherwise in its motion. What is more, there is no reason why the United States could not send Rule 45 subpoenas to the Governor and Attorney General, if it believes those offices may possess relevant, nonprivileged information. The United States identifies no reason why it would be prejudiced by following the Federal Rules of Civil Procedure for non-party discovery. In short, the motion to compel is improper, lacks merit, and should be denied.

ARGUMENT

I. The Governor and Attorney General Are Not Parties to the United States' Lawsuit

As a preliminary matter, all agree that the Governor and Attorney General are not parties to the United States' lawsuit. And although the Governor is a named defendant in several of the other cases consolidated before the Court, the Attorney General is not a party to any of them. It is hard to imagine why he would be. A state official is a proper defendant only if he "has the authority to enforce the challenged law," *City of Austin v. Paxton*, 943 F.3d 993, 998 (5th Cir. 2019), and an order directed at the official would "afford the Plaintiffs the relief that they seek." *Tex. Alliance for Retired Ams. v. Scott*, 38 F.4th 669 (5th Cir. 2022) (quoting *Mi Familia Vota v. Abbott*, 977 F.3d 461, 468 (5th Cir. 2020)). The Attorney General neither enforces the new electoral districts nor could the United States obtain any relief for their Voting Rights Act claims from an order directed at him. And although the Attorney General is defending the new districts on Defendants' behalf, it is well-established that the broad "duty to enforce and uphold the laws of Texas" does not render the Attorney General a proper defendant. *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 181 (5th Cir. 2020).

Likewise, the United States has failed to explain how it could obtain relief for its claims from an order directed at the Governor. Indeed, when asked why the United States believed the Governor was a proper party, counsel responded that the Governor signed the bills establishing the new electoral districts. But it has long been clear that "a governor cannot be sued for signing a bill into law." *Women's Emergency Network v. Bush*, 323 F.3d 937, 950 (11th Cir. 2003) (citing *Supreme Ct. of Va. v. Consumers*

Union of U.S., Inc., 446 U.S. 719, 731–34 (1980)).

To reiterate, the Governor and Attorney General are not parties to the United States' lawsuit, and therefore are not proper recipients of party discovery. The United States' amalgam of arguments to the contrary are unavailing. First, the United States points to Defendants' intention to produce a number of publicly-available materials related to the redistricting bills legislative history, *see* Motion at 2, arguing that this intention implies that Defendants are obligated to produce materials belonging to the Governor or the Attorney General. But those two things are entirely unrelated. For the efficiency of the litigation and for all parties' convenience, Defendants intend to compile and produce a central body of public documents, including the notices, minutes, witness lists, and handouts available to the public in connection with committee hearings held during the third special session.[1] But this production has nothing to do with whether Defendants must respond to party discovery directed at the Governor and Attorney General, and this Court should not condone the attempted weaponization of professional courtesy.

Likewise, the State Defendants' actions regarding the Department of Public Safety in the SB1 cases, *see La Unión del Pueblo Entero v. Abbott*, No. 5:21-cv-844 (W.D. Tex.), does not support the United States' argument here. Motion at 2. In *LUPE*, in response to highly-sensitive document requests, State Defendants agreed to produce information on behalf of DPS—reserving the right to object on the basis that DPS is not a named defendant. What the motion to compel fails to mention is that the United States has since issued a Rule 45 subpoena to DPS, seeking to take its deposition. *See* Ex. A. Nothing about the State Defendants' actions in a separate series of cases indicates a waiver of Defendants' right in these cases to insist on proper compliance with federal discovery rules. This position is neither new nor unfamiliar to the United States. In fact, the United States has similarly

[1] *See generally* Texas Redistricting Committee, *Past Committee Meetings*, (accessed April 8, 2022), available at https://house.texas.gov/schedules/committee-schedules/advanced-search/search-results/?startDate=01/01/2019&endDate=20220407&chamber=h&committeeCode=C080&legislature=87

asked in the *LUPE* litigation that any discovery requests to the United States Department of Homeland Security or the United States Secretary of State be sent through the Rule 45 subpoena process.

Nor are the United States' references to past litigation at all significant. Motion at 2–3. Most importantly, neither *Texas v. Holder*, No. 1:12-cv-128 (D.D.C.) nor *Veasey v. Perry*, No. 2:13-cv-193 (S.D. Tex.) involved redistricting, and therefore neither informs the scope of party discovery in these circumstances. Moreover, nowhere in the United States' Exhibits 5, 6, and 7 is there mention of the State of Texas parties producing documents on behalf of the Attorney General. *See* ECF 213-6, 213-7, 213-8. The United States is wrong to represent that those exhibits substantiate the assertion that *the State* has "demonstrated possession, custody, or control of documents held within . . . OAG." Motion at 2. In addition, the Governor and Secretary of State were named parties in the *Veasey* case, so the production of OOG and SOS documents *there* says nothing about whether the State must produce documents on behalf of OOG and OAG *here*.

Finally, the United States argues that OAG is a proper recipient of party discovery because the Attorney General is the State's legal representative. *See* Motion at 5. Of course, a party's documents possessed by the party's attorney are deemed within the party's care, custody, or control for purposes of discovery. But the only documents that apply are those that *belong to the client*. Clearly, an opposing party cannot ask a party's lawyer to produce documents belonging to a different client or belonging to the lawyer personally. *Cf. Hickman v. Taylor*, 329 U.S. 495, 510 (1947) ("Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."). The Attorney General's confidential files and mental impressions, attorney-client communications, and other work product simply are not an appropriate target for discovery.

In this instance, the parties to the United States' lawsuit are the Secretary of State and the State of Texas. As explained below, the Governor and the Attorney General are not included within *the State*

of Texas for purposes of these redistricting cases. For this reason, the documents the Attorney General possesses and must search in response to the United States' requests are only those he possesses on behalf the named parties. For these cases, the scope of *the State* is limited to the Secretary of State.[2] The Attorney General has no obligation to search documents he possesses separate and apart from his representation of the Secretary.

II. The Governor and Attorney General Are Not Included Within *The State of Texas* for Purposes of these Redistricting Cases

A. The Voting Rights Act Limits *The State* to State Entities from which the United States Could Obtain Relief

As explained above, neither the Governor nor the Attorney General are named defendants in the United States' lawsuit. Rule 34 applies only to *parties*, so the United States cannot direct party discovery to OOG or OAG unless they are included within the scope of "The State of Texas" for purposes of these redistricting lawsuits. The United States does not seriously attempt to establish this premise, dedicating only one cursory paragraph to this portion of its brief. *See* Motion at 6 (conceding that the "legal question of what constitutes a State for purposes of this litigation is complex" and, *id.* at 7, concluding that OOG and OAG must be included because they "possess relevant information").

Moreover, the United States disregards the most important interpretive consideration: the text of statute authorizing it to bring its lawsuit. In its complaint, the United States alleges that it brings its suit under 52 U.S.C. § 10308(d). *See United States v. Texas*, No. 3:21-cv-299, ECF 1 ¶ 7 (W.D. Tex. Dec. 6, 2021). That provision allows the federal Attorney General to file "an action for preventative relief" or "injunctive or other relief" against "the State" or "State or local election officials" where the State or other political subdivision has allegedly violated one of several sections of the Voting Rights Act. Obviously, the purpose of suing the State or State official is to obtain relief in connection with the

[2] However, Defendants have not foreclosed the possibility that acceptance of party discovery on behalf of the Governor may be acceptable in this instance, even though the Governor is *the State* and is therefore not a party to the United States' lawsuit. *See infra* Argument Part III.

alleged violation. Logically, then, the scope of *the State* for a lawsuit brought under § 10308(d) is limited to those components of the State than can provide relief from the alleged violation.

Here, the United States alleges that several Texas House and congressional districts dilute the voting strength of racial and ethnic minorities in violation of Section 2. As always, the requested relief flows from the alleged injury. *See* Compl. at 44 (asking the Court to enjoin "Defendants, their agents and successors in office, and all persons acting in concert with them from *administering, implementing, or conducting any future elections* for the Texas Congressional Delegation under the 2021 Congressional Plan and for the Texas House and the 2021 House Plan") (emphasis added). As such, for purposes of these redistricting cases, *the State of Texas* includes only those components of the State that administer, implement, or conduct elections, and could therefore be ordered not to do so until new maps were imposed. *See Okpalobi v. Foster*, 244 F.3d 405, 427 (5th Cir. 2001) (en banc) (It is an "elemental fact" that "a state official cannot be enjoined to act in any way that is beyond his authority to act in the first place."); *Alabama v. United States*, 304 F.3d 583, 590 (5th Cir. 1962) (Fundamentally, "an injunction may compel the performance of *a duty*" a state official already has.) (emphasis added) (quoting *Loisel v. Mortimer*, 277 F. 822, 886 (5th Cir. 1922)).

Defendants do not dispute that—were the United States to prevail on its claims—some form of relief could be obtained from the Secretary of State. But, as discussed above, the United States has failed to point to any relief it could obtain from the Governor or Attorney General. As such, there is only one State entity the parties have identified as being able to give "preventative relief" or "injunctive or other relief," 52 U.S.C. § 10308(d), should the United States prevail on its claims: the Secretary of State. That is the beginning and end of *the State* in the context of the United States' redistricting claims.

B. The United States' Definitions of "The State" are Logically Inconsistent

The United States offers two theories on the scope of *the State of Texas* for purposes of these redistricting cases, but both are illogical. First, the United States argues that any State official or entity

that was "involved in relevant decision-making" or "possesses relevant information," Motion at 6–7, is included in *the State*. But that confuses the difference between information that may be discoverable and information that is subject to *party* discovery. It is often the case that third parties may have been involved in the series of events that form the basis of a lawsuit, and that accordingly they may possess discoverable information. But that does not make those persons and entities *parties*. Indeed, such a circumstance is exactly why we have Rule 45.

In fact, the United States implicitly contradicts its position by sending subpoenas to the Texas Legislative Council, Lieutenant Governor Dan Patrick, Speaker Dade Phelan, and twenty-four other legislators and staff. Of course, the latter are agencies and officials of the State of Texas. But no party takes the position that they are *the State* in these circumstances. In effect, the United States concedes that there are Texas agencies and officials who were involved in the redistricting process and who may possess discoverable information, but who are not proper recipients of party discovery. It therefore cannot logically be true that the question of whether a state agency or official is included in *the State of Texas* "turns on whether [the relevant entity] possess[es] relevant information." Motion at 7.

The United States then argues that *the State* includes all "executive agencies." Motion at 6. For this proposition, it cites several cases in which federal agencies were directed to receive party discovery in a case in which *the United States* was a named plaintiff or defendant. For one thing, the United States fails to articulate a rule for when federal agencies are included within *the United States*. Instead, it simply points to three out-of-circuit district-court decisions, none of which involve redistricting, and assumes that they support its assertion here regarding OOG and OAG. They do not.

But even supposing it might be helpful to consider cases outside of the redistricting context, it is clearly inappropriate to analogize to the federal government because, unlike the latter, the State of Texas utilizes a plural executive. The United States' comparison to federal agencies assumes that federal agencies are included within *the United States* because they are controlled by the same

executive—the President. Indeed, one of the cases it relies on expressly states as much. *See North Dakota v. United States*, No. 1:19-cv-150, 2021 WL 6278456, at *4 (D.N.D. Mar. 24, 2021) (Proper to order party discovery of federal agencies because "the President ha[s] statutory and constitutional authority over the executive branch agencies and control over the information requested."). The United States wrongly assumes that this logic extends to Texas executive agencies.[3]

But Texas agencies are not controlled by the same executive. Indeed, it is beyond debate that the Governor, Attorney General, and other executives head offices have independent constitutional existence and authority. *See* Tex. Const. art. IV, § 1 ("[T]he Executive Department of the State shall consist of a Governor, who shall be the Chief Executive Officer of the State, a Lieutenant Governor, Secretary of State, Comptroller of Public Accounts, Commissioner of the General Land Office, and Attorney General."); *see also City of Dallas v. Stewart*, 361 S.W.3d 562, 573 (Tex. 2012) ("The structure of Texas government permits the ties between a particular agency and each of the three branches of the state government to be weaker—sometimes far weaker—than they would be in the federal government.") (quotation omitted). The United States' cursory argument regarding federal executive agencies does not extend to Texas executive agencies for the simple reason that the United States and Texas have different executive structure.

Finally, the United States argues that *the State of Texas* must include more than the Secretary of State in this instance, otherwise there would be no need to have independently named the Secretary. Motion at 7. It argues that Defendants' position somehow undermines the VRA's authorization of the federal Attorney General to sue States. That is a *non sequitur*. Both parties agree that—should the United States prevail on the merits—relief could be obtained from the Secretary of State. And the whole purpose of § 10508(d) is to authorize the Attorney General to obtain relief for alleged VRA

[3] Indeed, counsel for the United States has insisted that—just as the Department of Justice accepts party discovery on behalf of the United States—so too must OAG accept party discovery on behalf of the State of Texas.

violations. As such, there is no concern that the scope of *the State* in this circumstance will prevent the United States from obtaining appropriate relief, should it be found warranted. In addition, if the State of Texas and the Secretary of State are redundant here, that is the United States' fault, as it is the one who named them as parties to their lawsuit.

III. Defendants Did Not Reject Requests for Documents from the Governor

The Governor is not included within *the State* for all the reasons explained above. Nevertheless, Defendants have not foreclosed the possibility of responding to the United States' requests on behalf of the Governor. The United States' assertion that Defendants "specifically rejected a request to search documents in possession of . . . the Office of the Governor," Motion at 2, is belied by the very exhibit they cite. Defendants plainly stated their willingness to discuss the subject.[4]

And for good reason. Although the Governor is not a party to the United States' lawsuit, he is named in most of the complaints filed by the private plaintiff groups. And three of those groups—the LULAC, NAACP, and Voto Latino Plaintiffs—have sent Defendants requests for production that relate to the Governor. Defendants have since produced responsive, nonprivileged documents from OOG. Given the likelihood that these documents will be shared with the United States, Defendants remain open to providing discovery produced to other parties to the United States, even though the Governor is not included within *the State of Texas* in this case.

To reiterate, Defendants did not reject the United States' requests for documents from the Governor. To the contrary, it was counsel for the United States who expressly declined to discuss the subject during the meet and confer. These tactics accentuate the fact that the United States' motion

[4] *See* ECF 213-2 (email from Defendants to United States) ("Regarding the United States' RFPs and the Office of the Governor, this is the first time you have raised this issue. As you are aware, DOJ did not sue the Office of the Governor and it is therefore not a party to the United States' lawsuit. In addition, in our responses to your requests for production, we objected to, among other things, the overbreadth of the requests and the United States' overly-broad definition of "Defendants." However, I would note that we have recently received RFPs directed at the Governor, issued by private plaintiffs in this litigation, whose lawsuits named the Governor as a party. We have not yet served our objections and responses to those requests because they are not yet due. But we would be happy to meet and confer concerning your contention that the Governor falls within "The State of Texas" for the exclusive purpose of these redistricting cases.").

to compel is premature, ill-thought-out, and ultimately deficient.

IV. Rule 45 Remains Available to the United States

Finally, although the United States may not send party discovery to the Governor or Attorney General, there is a proper method by which it can request discoverable information from these offices: Rule 45. Nothing prevents the United States from sending subpoenas *duces tecum* if it believes there is relevant, nonprivileged information within OOG or OAG's care, custody, or control. But counsel for the United States did not even discuss this possibility with counsel for Defendants. Again, the United States demonstrates its disregard for well-established and uncontroversial discovery rules.

CONCLUSION

Defendants respectfully request that the Court deny the United States' motion to compel.

Date: April 8, 2022

Respectfully submitted.

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COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on April 8, 2022, and that all counsel of record were served by CM/ECF.

/s/ Patrick K. Sweeten
PATRICK K. SWEETEN

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
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LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*, *Plaintiffs,* V. GREG ABBOTT, *et al.*, *Defendants.*	§ § § § § § § § § § §	Case No. 3:21-cv-00259 [Lead Case]
UNITED STATES OF AMERICA, *Plaintiff,* V. STATE OF TEXAS, *et al.*, *Defendants.*	§ § § § § § § § § § §	Case No. 3:21-cv-00299 [Consolidated Case]

EXHIBIT A

RULE 45 SUBPOENAS SENT TO TEXAS DEPARTMENT OF PUBLIC SAFETY BY THE UNITED STATES

AO 88A (Rev. 12/20) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Texas

La Union del Pueblo Entero, et al. *Plaintiff* v. State of Texas, et. al. *Defendant*	)	Civil Action No. 5:21-cv-844 (XR) & consol. cases

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Texas Department of Public Safety

(Name of person to whom this subpoena is directed)

☑ Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must promptly confer in good faith with the party serving this subpoena about the following matters, or those set forth in an attachment, and you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about these matters: See Attachment A

Place:	Date and Time:
Texas Department of Public Safety 5805 North Lamar Austin, Texas 78752	04/20/2022 9:00 am

The deposition will be recorded by this method: Stenographic & Audiovisual Recording

☑ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material: By April 18, 2022, all documents, if any, that the designee relied on to prepare for testimony as to matters within their knowledge and as to matters known by or reasonably available to the Texas Department of Public Safety

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 04/06/2022

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk	/s/ Michael E. Stewart *Attorney's signature*

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* the United States of America, who issues or requests this subpoena, are:

Michael Stewart, Civil Rights Division, U.S. Department of Justice, 950 Pennsylvania Ave. NW, Washington, DC 20530
Email: michael.stewart3@usdoj.gov; Phone: 202-598-7233

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

ATTACHMENT A

PLEASE TAKE NOTICE that pursuant to Rule 30 of the Federal Rules of Civil Procedure, counsel for the United States and Consolidated Plaintiffs will take the oral deposition of the Texas Department of Public Safety, testifying through an individual designated by the Texas Department of Public Safety to testify on its behalf, concerning the Topics for Oral Examination listed below. The deposition shall commence at 9:00 a.m. on April 20, 2022, at the Texas Department of Public Safety, 5805 North Lamar, Austin, Texas 78752. The deposition shall be recorded by stenographic means and may also be recorded by additional audiovisual means, and shall take place before a notary public or other person authorized by law to administer oaths.

The person designated as deponent shall be prepared to testify as to matters within their knowledge and as to matters known by or reasonably available to the Texas Department of Public Safety. This notice serves to inform the Texas Department of Public Safety that it has a duty to make such designation.

The United States further requests that the Texas Department of Public Safety produce by April 18, 2022 all documents, if any, that the designee relied on to prepare for testimony as to matters within their knowledge and as to matters known by or reasonably available to the Texas Department of Public Safety. For the purpose of this deposition, "document" is defined to be synonymous in meaning and scope as the term "document" is used under Federal Rule of Civil Procedure 34 and the phrase "writings and recordings" is defined in Federal Rule of Evidence 1001, and includes, but is not limited to, any computer discs, tapes, printouts and emails, and databases, and any handwritten, typewritten, printed, electronically-recorded, taped, graphic, machine-readable, or other material, of whatever nature and in whatever form, including all non-

identical copies and drafts thereof, and all copies bearing any notation or mark not found on the original.

Topics for Oral Examination

1. The subject matter and nature of the contents of all fields of data produced to the United States in this litigation from the Department of Public Safety's driver license or identification card database. For avoidance of doubt, those fields are:
    a. DL/ID/UNL or EC Number
    b. Person ID
    c. First Name
    d. Last Name
    e. Middle Name
    f. Suffix
    g. Date of Birth
    h. Social Security Number
    i. Permanent Street Address 1
    j. Permanent Street Address 2
    k. Permanent City
    l. Permanent State
    m. Permanent Zip Code
    n. Permanent Zip Code Ext.
    o. Permanent County
    p. Permanent Country
    q. Mailing Street Address 1

r. Mailing Street Address 2

s. Mailing City

t. Mailing State

u. Mailing Zip Code

v. Mailing Zip Code Ext.

w. Mailing Country

x. Sex

y. Disabled Veteran

z. Homebound

aa. AKA Name

bb. AKA DL/ID Number

cc. Card Status

dd. Card Type

ee. License Confiscated

ff. Reported Deceased

2. The practices and procedures by which records in the Department of Public Safety's driver license, identification card, and election identification certificate database are maintained and updated, including when individuals are first issued a Texas identification document, when individuals exchange one type of Texas identification document for another, when individuals surrender a Texas identification document or have a Texas identification document revoked, when individuals who previously resided in Texas return to reside in Texas from another state, when individuals may have multiple forms of identification or multiple records, and any other circumstances

that may produce data anomalies in individuals' records that may impact the ability of voters to provide identification document numbers required by SB 1 or the ability of the State to match information required by SB 1 and provided by voters to State records.

3. The nature, circumstances, processes, procedures, directions or instructions for, reasoning or rationale for, basis for, and general contents of any import, export, match, comparison, copying, exchange, or other communication of data between the Department of Public Safety's driver license, identification card, and election identification certificate database and the Texas Election Administration Management (TEAM) database maintained by the Office of the Texas Secretary of State, including on a recurring or a non-recurring basis. This includes, but is not limited to, any import, export, match, comparison, copying, exchange, or other communication of data on or around December 20, 2021.

4. The existence, processes, procedures, rules, practices, timing, and effectiveness of maintenance practices, accuracy testing, validation testing, or other procedures for determining or ensuring the consistency and accuracy of records in the Department of Public Safety's driver license or identification card database.

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2022, I served a true and correct copy of the foregoing via electronic mail on all counsel of record.

/s/ Michael E. Stewart
Michael E. Stewart
Voting Section
Civil Rights Division
U.S. Department of Justice
michael.stewart3@usdoj.gov

AO 88A (Rev. 12/20) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Texas

La Union del Pueblo Entero, et al. *Plaintiff* v. State of Texas, et. al. *Defendant*	)	Civil Action No. 5:21-cv-844 (XR) & consol. cases

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Texas Department of Public Safety

(Name of person to whom this subpoena is directed)

☑ Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must promptly confer in good faith with the party serving this subpoena about the following matters, or those set forth in an attachment, and you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about these matters: See Attachment A

Place:	Date and Time:
Office of the United States Attorney for the Western District of Texas, 903 San Jacinto Blvd., Suite 334, Austin, Texas 78701	04/20/2022 9:00 am

The deposition will be recorded by this method: Stenographic & Audiovisual Recording

☑ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material: By April 18, 2022, all documents, if any, that the designee relied on to prepare for testimony as to matters within their knowledge and as to matters known by or reasonably available to the Texas Department of Public Safety

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 03/18/2022

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk	/s/ Michael E. Stewart *Attorney's signature*

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* the United States of America, who issues or requests this subpoena, are:

Michael Stewart, Civil Rights Division, U.S. Department of Justice, 950 Pennsylvania Ave. NW, Washington, DC 20530
Email: michael.stewart3@usdoj.gov; Phone: 202-598-7233

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

ATTACHMENT A

PLEASE TAKE NOTICE that pursuant to Rule 30 of the Federal Rules of Civil Procedure, counsel for the United States and Consolidated Plaintiffs will take the oral deposition of the Texas Department of Public Safety, testifying through an individual designated by the Texas Department of Public Safety to testify on its behalf, concerning the Topics for Oral Examination listed below. The deposition shall commence at 9:00 a.m. on April 20, 2022, at the Office of the United States Attorney for the Western District of Texas, 903 San Jacinto Blvd., Suite 334, Austin, Texas 78701. The deposition shall be recorded by stenographic means and may also be recorded by additional audiovisual means, and shall take place before a notary public or other person authorized by law to administer oaths.

The person designated as deponent shall be prepared to testify as to matters within their knowledge and as to matters known by or reasonably available to the Texas Department of Public Safety. This notice serves to inform the Texas Department of Public Safety that it has a duty to make such designation.

The United States further requests that the Texas Department of Public Safety produce by April 18, 2022 all documents, if any, that the designee relied on to prepare for testimony as to matters within their knowledge and as to matters known by or reasonably available to the Texas Department of Public Safety. For the purpose of this deposition, "document" is defined to be synonymous in meaning and scope as the term "document" is used under Federal Rule of Civil Procedure 34 and the phrase "writings and recordings" is defined in Federal Rule of Evidence 1001, and includes, but is not limited to, any computer discs, tapes, printouts and emails, and databases, and any handwritten, typewritten, printed, electronically-recorded, taped, graphic, machine-readable, or other material, of whatever nature and in whatever form, including all non-

identical copies and drafts thereof, and all copies bearing any notation or mark not found on the original.

Topics for Oral Examination

1. The subject matter and nature of the contents of all fields of data produced to the United States in this litigation from the Department of Public Safety's driver license or identification card database. For avoidance of doubt, those fields are:
    a. DL/ID/UNL or EC Number
    b. Person ID
    c. First Name
    d. Last Name
    e. Middle Name
    f. Suffix
    g. Date of Birth
    h. Social Security Number
    i. Permanent Street Address 1
    j. Permanent Street Address 2
    k. Permanent City
    l. Permanent State
    m. Permanent Zip Code
    n. Permanent Zip Code Ext.
    o. Permanent County
    p. Permanent Country
    q. Mailing Street Address 1

r. Mailing Street Address 2

s. Mailing City

t. Mailing State

u. Mailing Zip Code

v. Mailing Zip Code Ext.

w. Mailing Country

x. Sex

y. Disabled Veteran

z. Homebound

aa. AKA Name

bb. AKA DL/ID Number

cc. Card Status

dd. Card Type

ee. License Confiscated

ff. Reported Deceased

2. The practices and procedures by which records in the Department of Public Safety's driver license, identification card, and election identification certificate database are maintained and updated, including when individuals are first issued a Texas identification document, when individuals exchange one type of Texas identification document for another, when individuals surrender a Texas identification document or have a Texas identification document revoked, when individuals who previously resided in Texas return to reside in Texas from another state, when individuals may have multiple forms of identification or multiple records, and any other circumstances

that may produce data anomalies in individuals' records that may impact the ability of voters to provide identification document numbers required by SB 1 or the ability of the State to match information required by SB 1 and provided by voters to State records.

3. The nature, circumstances, processes, procedures, directions or instructions for, reasoning or rationale for, basis for, and general contents of any import, export, match, comparison, copying, exchange, or other communication of data between the Department of Public Safety's driver license, identification card, and election identification certificate database and the Texas Election Administration Management (TEAM) database maintained by the Office of the Texas Secretary of State, including on a recurring or a non-recurring basis. This includes, but is not limited to, any import, export, match, comparison, copying, exchange, or other communication of data on or around December 20, 2021.

4. The existence, processes, procedures, rules, practices, timing, and effectiveness of maintenance practices, accuracy testing, validation testing, or other procedures for determining or ensuring the consistency and accuracy of records in the Department of Public Safety's driver license or identification card database.

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2022, I served a true and correct copy of the foregoing via electronic mail on all counsel of record.

/s/ Michael E. Stewart
Michael E. Stewart
Voting Section
Civil Rights Division
U.S. Department of Justice
michael.stewart3@usdoj.gov

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*, *Plaintiffs,* V. GREG ABBOTT, *et al.*, *Defendants.*	§ § § § § § § § § § §	Case No. 3:21-cv-00259 [Lead Case]
UNITED STATES OF AMERICA, *Plaintiff,* V. STATE OF TEXAS, *et al.*, *Defendants.*	§ § § § § § § § § § §	Case No. 3:21-cv-00299 [Consolidated Case]

EXHIBIT B

EMAIL FROM UNITED STATES TO STATE DEFENDANTS, ASKING STATE DEFENDANTS TO SEND RULE 45 SUBPOENAS TO EXECUTIVE AGENCIES

Jack DiSorbo

From: Eric Hudson
Sent: Friday, March 18, 2022 5:18 PM
To: Elizabeth Saunders
Cc: Jeff White; Kathleen Hunker; Jack DiSorbo; Aaron Barnes; Zachary Berg; Patrick Sweeten
Subject: FW: SB 1: State Department Discovery

FYI. To the file, please.

s/Eric Hudson

From: Freeman, Daniel (CRT) <Daniel.Freeman@usdoj.gov>
Sent: Wednesday, February 23, 2022 8:03 AM
To: Eric Hudson <Eric.Hudson@oag.texas.gov>; Jeff White <Jeff.White@oag.texas.gov>; Jack DiSorbo <Jack.DiSorbo@oag.texas.gov>
Cc: Dellheim, Richard (CRT) <Richard.Dellheim@usdoj.gov>; Yun, Jennifer (CRT) <Jennifer.Yun@usdoj.gov>; Stewart, Michael (CRT) <Michael.Stewart3@usdoj.gov>; Paikowsky, Dana (CRT) <Dana.Paikowsky@usdoj.gov>
Subject: RE: SB 1: State Department Discovery

Eric,

I write to provide an update on your agency discovery requests.

With respect to CISA, the Department of Homeland Security advises that the proper procedure is to send a subpoena pursuant to the processes established under *United States ex rel. Touhy v. Regan*, 340 U.S. 462 (1951). Homeland Security's *Touhy* regulations are available at 6 C.F.R. Part 5. CISA requests that you serve the subpoena via email to cisa.occ@cisa.dhs.gov and copy my team at DOJ. To ensure that the full scope of information you seek is covered by the subpoena, they recommend that you direct the subpoena simply to CISA. If you have a strong preference to direct the subpoena to a named individual, it can be directed to CISA, c/o CISA Chief Counsel.

With respect to requests concerning components of the Department of Justice, including the FBI, we will accept those as party discovery. To the extent that you wish to target such requests towards particular offices or custodians, specificity will aid us in identifying any responsive documents.

Please let me know if you have any questions.

Dan

From: Freeman, Daniel (CRT)
Sent: Tuesday, February 22, 2022 11:12 AM
To: Eric Hudson <Eric.Hudson@oag.texas.gov>; Jeff White <Jeff.White@oag.texas.gov>; Jack DiSorbo <Jack.DiSorbo@oag.texas.gov>
Cc: Dellheim, Richard (CRT) <Richard.Dellheim@usdoj.gov>; Yun, Jennifer (CRT) <Jennifer.Yun@usdoj.gov>; Stewart, Michael (CRT) <Michael.Stewart3@usdoj.gov>; Paikowsky, Dana (CRT) <Dana.Paikowsky@usdoj.gov>
Subject: SB 1: State Department Discovery

Eric,

I am continuing to work on your agency discovery requests. With respect to the State Department, the proper procedure is to send a *Touhy* letter to my team and provide a courtesy copy by mail to the following address:

The Executive Office
Office of the Legal Adviser
Suite 5.600
600 19th Street NW
Washington, D.C. 20522

The State Department's Touhy regulations are available at 22 C.F.R. Part 172. The State Department has also provided the following guidance: "Please set forth in writing and with as much specificity as possible, the nature and purpose of the official information sought, including a description of the records you are requesting, if any. This information is needed so that the Department can determine whether it is appropriate to authorize the disclosure of the requested information and/or records."

Please let me know if you have any questions. I will be in touch regarding the remaining requests.

Dan

Daniel J. Freeman
Trial Attorney
Voting Section, Civil Rights Division
U.S. Department of Justice
4 Constitution Square
150 M Street NE, Room 8.143
Washington, DC 20530
(202) 305-4355 (o), (202) 305-5451 (c)
daniel.freeman@usdoj.gov